LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 25 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 853

THOMAS STERGER and LOUIS KLEIN,

Petitioners,

vs.

THE STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

DOMINIC FRINZI,
Milwaukee, Wisconsin,
Counsel for Petitioners.

JAMES EVAN SIFF,
New York, N. Y.
Of Counsel.

LOWER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WO-2-0689

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	9

Appendix:

Notice of Rendering and Entering of Opinion of Wisconsin Supreme Court	10
Opinion of the Wisconsin Supreme Court	11
Transcript of Material Parts of Testimony at Motion to Suppress	23
Opinion of Trial Court Denying Petitioners Motion to Suppress	32

CITATIONS

Cases:

	PAGE
Beck v. Ohio, 13 L. Ed. 2nd 142 (1964) not yet officially reported	7
Draper v. U. S., 358 US 307 (1959)	7
Harris v. United States, 331 US 145 (1947)	8
Ker v. California, 374 US 23 (1963)	6, 8
Mapp v. Ohio, 367 US 643 (1961)	6, 8
Preston v. United States, 376 US 364 (1964)	8
United States v. Di Re, 332 US 581 (1948)	5
United States v. Rabinowitz, 339 US 56 (1950)	8

Statutes:

Michigan State Anno. 28.874 Sec. 15	5
Wisconsin Statutes: Sec. 943.20	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

THOMAS STERGER and LOUIS KLEIN,
Petitioners,

vs.

THE STATE OF WISCONSIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Thomas Sterger and Louis Klein pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin, rendered in this cause on October 27, 1964, affirming their conviction by the State of Wisconsin, Circuit Court, Milwaukee County.

Opinion Below

The opinion of the Supreme Court of Wisconsin has not as yet been reported either officially or unofficially. It is printed in the appendix to this petition (App. 11).

Grounds on Which Jurisdiction of This Court Is Invoked

The affirming opinion of the Supreme Court of the State of Wisconsin was rendered on October 27, 1964 and was filed on the same date (App. 10).

Jurisdiction of this Court to review the aforesaid judgment of the Supreme Court of the State of Wisconsin by Writ of Certiorari is invoked under Title 28 of the United States Code, Section 1257 (3), in that at the trial of this case resulting in their conviction and incarceration, the petitioners were deprived of their liberty without due process of law, contrary to the IVth and XIVth Amendments of the Constitution of the United States of America.

Questions Presented for Review

1. May police officers of one state arrest and search two individuals without a warrant, when the sole basis of said arrest and search is that 21 hours previously, a teletype message had been received from police in a sister state to the effect that the two individuals were suspected of having committed a crime in that sister state, when in fact there is no formal charge pending against the individuals in the state where the crime was allegedly committed, and neither the Michigan police who received the message, nor the Wisconsin police who sent the message, saw the crime committed?

2. If a police officer in Detroit, Michigan receives an order from his radio dispatcher telling him to go to the local airport and observe a particular automobile and two named persons who might enter said automobile because said persons are suspected of having committed a $100,000 theft in the city of Milwaukee, Wisconsin, may said police

officer, without benefit of any warrant, arrest said persons and may objects which are then seized be introduced in evidence at their trial in the state of Wisconsin, *without any inquiry into the facts which the Wisconsin police had at their disposal when they sent the original message?*

3. If two men are arrested on June 28th, 1962, may items taken from the coat of one of them eighteen hours later on June 29th, 1962, be introduced in evidence at their trial, when said coat was in the possession of the police for the entire time period, and no warrant was obtained prior to the second search?

Constitutional Provisions Herein Involved

United States Constitution—Fourth Amendment.

United States Constitution—Fourteenth Amendment.

Statement of the Case

On June 26, 1962 at approximately 12:30 p. m., Earl J. Parisey left his car containing a valuable quantity of jewelry parked in the street while he entered a restaurant in Milwaukee, Wisconsin, to eat lunch. Upon finishing his meal, he returned to where he had parked the car and both the car and its contents were missing (R. 264).

On June 27, 1962, for reasons never disclosed, the Milwaukee Police Department sent a teletype message to the Detroit Headquarters of the Michigan State Police. The substance of the message was that the theft had been committed, the two petitioners were suspects and that the said suspects had parked a car with Ohio license plates at the Detroit Airport (R. 125), (App. 23).

On June 27, 1962, at approximately 6:00 P. M., Sgt. Craft of the Michigan State Police received a call from his dispatcher, transmitting to him the substance of the teletype message referred to above (R. 123), (App. 23). He proceeded to place the aforementioned car (which was in fact, found at the airport) under surveillance, and on June 28, 1962, at approximately 3:35 P. M., the petitioners arrived at the car and after entering it, were placed under arrest by Sgt. Craft (R. 129), (App. 24). Incidental to this arrest, they were searched and certain items were then seized. In addition to these items, their coats were seized and turned over to Sgt. McPhail also of the Michigan State Police, who searched these coats the following day, and seized additional evidence (R. 158), (App. 31). Each of the aforementioned searches took place without benefit of warrants of any kind.

On June 29, 1962, the day after the arrest, arrest warrants were issued in Milwaukee and forwarded to Michigan ordering the arrest of the petitioners, who then waived extradition and were returned to Wisconsin (R. 5 and 45).

The petitioners were indicted, charged with having committed thefts in violation of Section 943.20 of the Wisconsin Statutes.

Prior to the trial of the action, the petitioners each made a Motion to Suppress the items heretofore alluded to, and to prevent their introduction in evidence. A hearing was had on said motion on May 10, 1963, and said motion was denied (R. 190), (App. 32-35).

Petitioners were later tried and convicted and sentenced to serve a term of up to 12 years in the Wisconsin State Penitentiary at Waupon. Said items heretofore referred to were introduced in evidence at the trial over the objections of both petitioners (R. 500).

They appealed to the Wisconsin Supreme Court, raising three issues, the only one of which is relevant here, being as follows:

> "Were the arrests of defendants in Michigan prior to the issuance of any warrant in Wisconsin illegal, thereby rendering illegal the search and seizure made incidental to such arrests" (App. 12).

The court there answered said question in the negative, holding first that the legality of the arrests must be judged by Michigan Law (on the basis of this Court's decision in *United States* v. *Di Re*, 332 US 581 (1948) (App. 12) and then holding that said arrests were legal under Section 764.15 Mich. Comp. Laws (1948) (Mich. State Anno. 28.874 Sec. 15).

> "We conclude that the teletype message received by the Michigan State Police from the Milwaukee Police Department was sufficient to afford probable cause for the Michigan police to believe that defendants had committed a felony. Therefore, the arrest and the search made incidental thereto, were valid" (App. 19).

Reasons for Granting the Writ

Probable Cause Not Present

1. By holding lawful the search herein described, the Court below has held in effect that a policeman can make any arrest which he is asked to make by another law enforcement officer, without either officer having a warrant, without either officer having seen the crime committed, and without any inquiry into the reasons for the request being made, the only apparent standard being that there is proven *ex post facto* to the arrest, that a crime in

fact was committed. The *reducto ad absurdum* of this principle is that police may substitute for the heretofore required probable cause the mere naked statement of another police officer. For if it is held that the mere receipt of an official police bulletin is in and of itself sufficient probable cause to make an arrest, then we have in effect eliminated the need for all inquiry into the facts at the disposal of the officer sending the message. This seemingly perverts the entire development of the law of search and seizure, which has occurred since the Court's decision in *Mapp* v. *Ohio,* 367 US 643 (1961) and certainly is an example of a State Court exceeding the bounds of freedom to set up reasonable standards afforded to it by the gravamen of this Court's opinion in *Ker* v. *California,* 374 US 23 (1963).

It is urged that the very least which the Wisconsin Court should have done was to conduct an inquiry into the facts which were known to the Milwaukee police when they sent the teletype message to Detroit, however, failing this, it is urged that on the basis of decisions of this Court, there was not sufficient probable cause for the Michigan State Police to make an arrest, and an incidental search.

In order to be admissible, evidence seized without benefit of a search warrant, must be the product of a search made incidental to a lawful arrest, *Ker* v. *California, supra,* and;

> "The lawfulness of the arrest without warrant in turn, must be based upon probable cause, which exists 'where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' " (*ibid.* at 34, 35).

On the surface, it would appear that information furnished by official police department sources, which was corroborated at least insofar as the arrival of petitioners at Detroit's Airport and the identity of petitioners being established did so, is such required probable cause. Especially in light of the holding in *Draper* v. *U. S.*, 358 US 307 (1959), where the information was furnished by a mere informant.

However, it is urged that the facts herein fall more closely within those present in *Beck* v. *Ohio,* 13 L. Ed. 2nd 142 (1964), (not yet officially reported); for whereas in *Draper,* the informant specifically stated that he *knew* defendant was selling narcotics in Denver, and he further *knew* that defendant was going to Chicago to purchase narcotics and he further *knew* that defendant would be returning from Chicago on one of two specific trains, here, as in *Beck,* the highest possible level, to which the police officers' knowledge could rise is suspicion.

Petitioners urge that no words could be more applicable to the facts at bar than those of this Court in *Beck, supra*:

> "* * * But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informant actually said, and why the officer thought the information was credible" (13 L. Ed. 2nd 142, at 148).

That is to say, there should in this case, have been an inquiry into those facts which the Wisconsin Police had at their disposal (i.e., by analogy, the Wisconsin Police were the informants herein) when they sent their message to Michigan.

SEARCH ON JUNE 29TH WAS NOT INCIDENTAL TO ARREST:

2. Even if the arrest herein were to be held lawful, there are limits to the permissible scope of a warrantless search incidental to a lawful arrest. See *Harris* v. *United States,* 331 US 145 (1947); *United States* v. *Rabinowitz,* 339 US 56 (1950); *Preston* v. *United States,* 376 US 364 (1964).

The search of petitioners' coats the day after their arrest is analogous to the search of the motor car which was held illegal in *Preston* v. *United States, supra*:

> "Once an accused is under arrest and in custody, then a search made at another place without a warrant, is simply not incidental to the arrest" (*ibid.* at 367).

As in *Preston,* at the time that Sgt. McPhail searched the petitioner Sterger's coat on June 29th, there was no danger that a weapon was therein concealed or that it would be removed from the jurisdiction; thus the search was too remote in time and place to be considered incidental to the arrest, even if said arrest were to be held lawful. Of course, the *Preston* case arose in the Federal Courts and the rule there might be deemed to be one of those set down by this Court in its capacity of supervisor of the Federal Court System, rather than as constitutional interpreter. However, the search here must be proscribed because it is unreasonable, and it in no way can be construed as one which a State could permit within the "working rules" concept of the *Ker* case, *supra.*[1]

---

[1] In *Ker,* the Supreme Court held that although the standard of reasonableness is the same under the Fourth and Fourteenth amendments, a distinction is to be made between evidence held inadmissible by the exercise of this Court's supervisory powers over federal courts, and that which is inadmissible because of constitutional prohibitions against unreasonable searches.

The possible consequence to the rights of individuals of upholding the arrest and search here are dire ones if we consider the present trend of law-enforcement officials to find loopholes in the judicial principles established and followed since the *Mapp* case. Even a vigorous prosecutor has taken note of this in a legal trade publication,[2] and as distasteful as it may be to view law enforcement agencies with a modicum of the suspicion that we view our criminals with, it is something which must be done if we are to give effect to the constitutional interpretations of this Court. To allow the arrests herein to be unreviewed is to create an atmosphere in which evasion of the law will be equally practiced by the law enforcers as by the lawless.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOMINIC FRINZI,
Milwaukee, Wisconsin,
Counsel for Petitioners.

JAMES EVAN SIFF,
New York, N. Y.
Of Counsel.

---

[2] Richard Kuh, former Chief Administrative Assistant District Attorney in New York County, New York, wrote a series of articles published in the New York Law Journal in September of 1962 in which he called attention to the fact that in the year which had then elapsed since the decision in *Mapp* v. *Ohio*, *supra*, there had been a curious rise in the number of defendants who "threw" items to the ground, thus making the items admissible in evidence, after being retrieved by a police officer; whereas if they had been sized from the person of the defendant, they would have been inadmissible. (New York Law Journal, September 18, 1962, p. 4, col. 2.)

APPENDIX

Notice of Entry of Decision

Office of the Clerk
(seal) SUPREME COURT
STATE OF WISCONSIN

FRANKLIN W. CLARKE
Clerk

Madison, October 27, 1964

To Mr. George Thompson, Atty. Gen.
Attn. Wm. A. Platz, Asst. Atty. Gen.
Mr. Wm. J. McCauley, Dist. Atty.
Milwaukee
Mr. Dominic Frinzi
Mr. Nicholas C. Catania
Mr. James M. Shellow
Milwaukee

Sir:—The Court today announced decision in your case as follows:

St. 30 State v. Louis Klein

St. 31 State v. Thomas G. Sterger

Judgment affirmed.

The opinion of the Court has been filed this day.

Respectfully yours,

FRANKLIN W. CLARKE
Clerk of Supreme Court.

Opinion of Wisconsin Supreme Court

Appeal from a judgment of the circuit court for Milwaukee county: HERBERT J. STEFFES, Circuit Judge. *Affirmed.*

Criminal prosecutions of defendants Louis Klein and Thomas G. Sterger for theft, the informations charging them with violation of sec. 943.20, Stats. The cases were consolidated for trial in the circuit court, and also for purposes of appeal in this court.

On June 27 1962, the Milwaukee police department sent a teletype message to the Detroit headquarters of the Michigan state police. The message stated that there had been a $100,000 jewelry theft in Milwaukee that day and that the persons involved had parked their 1960 maroon Oldsmobile at the Detroit metropolitan airport bearing an Ohio license plate, the number of which was given. The message also gave the names of the two defendants and their descriptions and stated that defendants were wanted in Milwaukee for this theft. Officers of the Michigan state police found the described Oldsmobile car parked at the airport. They placed the car under surveillance and the next day arrested the two defendants as they were about to enter it.

Incidental to the arrest defendants were searched and a watch and ring stolen in the theft were found on Sterger. An incriminating bag of keys was found in his luggage. The warrants for the arrest of defendants were not issued in Milwaukee until June 29, 1962, the day following their arrest. Before trial defendants moved that the articles seized as a result of the search made incidental to arrest be suppressed, and such motion was denied.

Defendants waived a jury trial and trial was had to the court. The seized articles were admitted in evidence over

the objection of defendants. The court found defendants guilty. Judgment was entered September 26, 1963, and defendants were sentenced to indeterminate terms of not more than twelve years. Defendants have appealed.

CURRIE, C. J. These issues are raised on this appeal:

(1) Were the arrests of defendants in Michigan prior to the issuance of any warrant in Wisconsin illegal thereby rendering illegal the search and seizure made incidental to such arrests?

(2) Did the trial court commit prejudicial error in sustaining the state's objection to questions put to a witness by defendants' counsel which sought to ascertain when the witness first talked to the police about the case?

(3) Did the trial court ground its finding as to the value of the stolen merchandise upon improper evidence?

LEGALITY OF THE ARRESTS

Inasmuch as the arrests complained of took place in Michigan the legality thereof is controlled by Michigan Law. *United States* v. *Di Re* (1948), 332 U. S. 581, 589, 68 Sup. Ct. 222, 92 L. Ed. 210.

We find the controlling Michigan statute to be sec. 764.15, Mich. Comp. Laws (1948) (Mich. Stats. Anno. 28.874, sec. 15). The material portions of this statute provide:

> "Any peace officer may, without a warrant, arrest a person—
>
> . . .
>
> "(e) When he has received positive information by written, telegraphic, *teletypic, telephonic, radio* or other authoritative source that another officer holds a warrant for such arrest;

> "(f) *When he has received such positive information broadcast from any recognized police or other governmental radio station, or teletype, as may afford him reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it;*" (Italics supplied.)

Sec. 764.15, when originally enacted in 1927, did not contain sub. (f) nor the above italicized words of sub. (e), but in 1935 the statute was amended to add these.

At common law, when a felony has been committed in one state, a peace officer of another state may validly arrest without a warrant a person suspected of having committed such felony if reasonable grounds exist for the officer's belief that the arrested person is the one who committed the crime. *People* v. *Euctice* (1939), 371 Ill. 159, 20 N. E. (2d) 83; *Burton* v. *New York & H. R. R. Co.* (1911), 147 App. Div. 557, 132 N. Y. Supp. 628, affirmed without opinion (1912), 210 N. Y. 567, 104 N. E. 1127, and latter judgment affirmed (1917), 245 U. S. 315, 38 Sup. Ct. 408, 62 L. Ed. 314; *State* v. *Taylor* (1898), 70 Vt. 1, 39 Atl. 447; *Williams* v. *Commonwealth* (1925), 142 Va. 667, 128 S. E. 572; *State* v. *Spangler* (1938), 120 W. Va. 72, 197 S. E. 360; which overruled earlier case of *George* v. *Norfolk & Western Ry.* (1916), 78 W. Va. 345, 88 S. E. 1036; Restatement, 1 Torts, p. 250, sec. 119, comment (e) and page 259, sec. 121(a); 5 Am. Jur. (2d), Arrest, page 739, sec. 47; Perkins, Law of Arrest. 25 Iowa Law Review (1940), 201, 243. *Cunningham* v. *Baker* (1894), 104 Ala. 160, 16 So. 68, sometimes cited as being contra, expressly found it unnecessary to decide whether an arrest without a warrant could be made of a fugitive wanted for crime in another state.

This common law rule with respect to arrest without a warrant of a fugitive wanted for felony in another state imposes no more stringent requirements than if such fugitive were wanted for crime in another part of the same state in which the arrest is made. Restatement, 1 Torts, page 250, sec. 119, comment (e). A special note is inserted to comment (e) explaining that the word "fugitive" as used in the text embraces persons who, for any purpose, have come into the state in which the arrest is made.

In *Johnson* v. *Reddy* (1955), 163 Ohio St. 347, 126 N. E. (2d) 911, the arrest without warrant in Ohio was made by police officers pursuant to teletype messages from Pennsylvania state police identifying suspect and advising that a felony had been committed in Pennsylvania and it was held that the arresting officers acted upon reasonable information. In its opinion the Ohio court stated (at page 352):

> "And we believe that in making an arrest without a warrant at the request of another police agency all reasonable doubts concerning the reasonableness of the information on which the arresting officer acts should be resolved in his favor."

There are no Michigan cases decided prior to the enactment of sec. 764.15, Mich. Comp. Laws (1948), which hold that the prevailing common law rule with respect to arrest without a warrant of fugitives from another state did not prevail in Michigan. In the absence of such an express holding we assume that such common law rule was recognized in that state. *Malcomson* v. *Scott* (1885), 56 Mich. 459, 23 N. W. 166, held an arrest without warrant in Michigan of a fugitive from Pennsylvania illegal because the letter from Pennsylvania requesting the ar-

rest was insufficient to provide probable cause. Absence of probable cause was shown by the facts that the letter which purported to come from one Girin, chief of police of Philadelphia, which was signed "J. H." in the name of Girin, and the letter failed to establish that a felony had been committed in Pennsylvania. The plain implication of this decision is that if Girin had personally signed the latter and had stated facts showing that the wanted person was suspected of having committed a felony in Pennsylvania, the arrest would have been held valid, although it was also pointed out that no warrant had been issued in Pennsylvania for the fugitive.

In the later case of *Kratzer* v. *Matthews* (1926), 233 Mich. 452, 206 N. W. 982, a telegram from a captain of detectives to a Michigan sheriff, that the sender held a warrant for Kratzer's arrest for making a false statement and requesting his arrest, was held to provide probable cause for Kratzer's arrest in Michigan. We deem it wholly immaterial that, in distinguishing the *Malcomson Case*, one of the distinguishing features was that the letter in the latter case did not state that a prosecution had been commenced or warrant issued. If Michigan prior to the enactment of sec. 764.15, Mich. Comp. Laws (1948) had a requirement that prosecution must have been started or a warrant issued before an arrest could be made without warrant, this statute eliminated that requirement.

Apparently the Michigan court has not construed sec. 764.15 (f), Mich. Comp. Laws (1948) with respect to whether or not the statutory words "from any recognized police or other governmental radio station, or teletype" is confined solely to those located in Michigan. Neither has it determined whether or not the further statutory words "reasonable cause to believe that a felony has been committed" refers only to felonies committed in Michigan.

Since pre-existing common law drew no distinction between arrests without warrants of fugitives from other states and residents of the state, we conclude that no implied restriction should be read into the statute which would prevent the statute's application to fugitives from other states. We can conceive of no legislative purpose to restrict the common law right to arrest without a warrant. It is a cardinal rule of statutory construction that rules of the common law are not to be changed by doubtful implication. *Leach* v. *Leach* (1952), 261 Wis. 350, 357, 358, 52 N. W. (2d) 896, and authorities therein cited.

In *Burton* v. *New York Cent. & H. R. R. Co., supra,* the New York Appellate Division construed a New York statute which authorized a peace officer to arrest without warrant "when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it" with respect to whether it was applicable where the felony had been committed in another state. The Court declared (132 N. Y. Supp., at page 633):

> "*Our statute does not require that the felony shall have been committed within this state,* nor does the common law. The authority to arrest without a warrant is general in a peace officer 'when a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it' (section 177, Code of Criminal Procedure), and people coming within this state have no right to complain if they are treated in the same manner that our own people are treated under the law." (Emphasis supplied.)

In 1937 Michigan enacted the Uniform Criminal Extradition Act, which Wisconsin had adopted in 1933, now

comprising ch. 964, Wis. Stats. Included in such act is this provision:

> "The arrest of a person may be lawfully made also by any peace officer without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one [1] year; * * *" Sec. 780.13, Mich. Comp. Laws (1948).

Defendants contend that this statute absolutely requires that before one wanted for commission of a felony in another state can be arrested without a warrant in Michigan, a warrant must be issued or some court proceeding instituted against the suspect in this other state. We find no merit in this contention.

The arrest referred to in this provision of the Uniform Criminal Extradition Act has reference to one which will support an extradition proceeding. In *Burton* v. *New York Cent. & H. R. R. Co., supra,* the argument was advanced that a person might not be arrested in New York until there had been compliance with sec. 2, subd. 2, art. IV, U. S. Const., and the implementing act of congress having to do with extradition. In disposing of this argument the New York court stated (132 N. Y. Supp., at page 631):

> "The plaintiff cites many authorities for this proposition, but none of them, we apprehend, goes to the extent of holding that a citizen of a sister state may not be arrested in this state for a crime committed in such sister state until all of the steps have been taken which would justify the rendition of such person. As well say that a man might not

> be arrested in this state for murder until he has been formally charged with crime by a grand jury."

This holding was affirmed in *Burton* v. *New York Cent. R. R. Co.* (1917), 245 U. S. 315 38 Sup. Ct. 408, 62 L. Ed. 314, in an opinion by Mr. Justice Brandeis, who held that these provisions of the United States constitution and federal statutes do not deal with an arrest in advance of extradition.

In the later New York case of *People* v. *Ormsby* (1930), 136 Misc. 637, 241 N. Y. Supp. 225, 227, the court declared:

> "A citizen of another state may be arrested in this state for a felony committed in another state, although all steps have not been taken which would justify the renditon of the persons so arrested.
>
> "The right to arrest a non-resident suspected of committing a felony in a foreign state should be considered in the same manner as the right to arrest a resident."

See also *State* v. *Anderson* (S. Car. 1833), 1 Hill 212.

Furthermore, defendants' contention ignores completely the existence of sec. 764.15 (f), Mich. Comp. Laws (1948), which authorized the instant arrests without any requirement of a warrant issued or prosecution begun in Wisconsin. This statute had been enacted two years prior to Michigan's adoption of the Uniform Criminal Extradition Act. By providing that radio or teletype messages will qualify as reasonable cause for the arresting officer to believe that the person to be arrested has committed a felony so as to justify an arrest without warrant, the Michigan legislature was undoubtedly cognizant of the use of airplanes and high speed automobiles by escaping crim-

inals. It is absurd to think that the legislature intended this statute not to allow arrests or the broadcasting or teletyping the request for arrest in case of a felony committed in another state until valuable time is lost in swearing out a warrant. If discovery of the felony occurred late at night or on a Sunday still more time would be lost by such procedure.

The provision of Secs. 764.15 (f) and 780.13, Mich. Comp. Laws (1948), insofar as they relate to arrest without a warrant are in *pari materia* and must be construed together. Repeals by implication are not favored and thus it is the duty of the court, if possible, to construe these two sections so that both shall be operative. 1 Lewis' Sutherland Statutory Construction (2d ed.), pages 463, 464, sec. 247; *McLoughlin* v. *Malnar* (1941), 237 Wis. 492, 497, 297 N. W. 370. This requires that we hold that sec. 870.13 does not repeal by implication any part of sec. 764.15 (f), but applies solely to an arrest made to support an extradition, and not to one made independently thereof.

We conclude that the teletype message received by the Michigan state police from the Milwaukee police department was sufficient to afford probable cause for the Michigan police to believe that defendants had committed a felony. Therefore, the arrest and the search made incidental thereto were valid.

Rulings on Evidence

Behnke, a witness for the state, gave testimony that was damaging to defendants. On cross-examination the following transpired:

> Mr. Cantania (counsel for defendants): "Q. When is the first time you talked to any member of

the Milwaukee Police Department regarding this case?

"Mr. O'Connell (assistant district attorney): A. Objected to as being immaterial.

"The Court: Sustained."

Mr. Cantania: "Q. Did you at any time give a description to any member of the Milwaukee Police Department of this Impala automobile?

"Mr. O'Connell: Same objection.

"The Court: Sustained."

Upon the sustaining of this last objection counsel for defendants dropped this line of questioning without informing the trial court of its purpose. On this appeal it is contended that the above quoted questions were asked for the purpose of ascertaining whether Behnke had furnished a written or recorded statement to the police, in order that the defense might request the court to have such statement made available for impeachment purposes. *State* v. *Richards* (1963), 21 Wis. (2d) 622, 124 N. W. (2d) 684, is cited in support of defendants' contention that it was error for the trial court to have ruled as it did.

The factual situation in the *Richards Case* is very different from that in the instant case with respect to alerting the trial court to the objective of these questions as to which objections were sustained. In *Richards*, defense counsel made the following request to the trial court (21 Wis. (2d), at page 628):

> " 'Will the court permit us to ask this witness whether or not in the month of September she gave a statement to the police and go into what, if anything—the different things she may or may not have said to the police. And after we have determined whether or not she has given a statement

> and what that statement was—then, have that statement to see whether it is consistent with what she now testifies to?' "

In that case the trial court was specifically advised of defense counsel's purpose. Here defense counsel failed to state the purpose of the interrogation which was objected to. Without such an explanation it lay within the discretion of the trial court to conclude that the information sought was irrelevant to the issues of the case. Therefore, we find no error was committed in sustaining the objections to the questions propounded to Behnke.

Defendants further contend that the trial court improperly admitted into evidence over objection a carbon copy of a document when the original was in existence and not produced. It is claimed that this was prejudicial because the trial court grounded its finding of value of the stolen property on this document, state's Exhibit 1.

The stolen items of merchandise were the property of Kor-Rect Jewelry Manufacturing Company. Komula, secretary-treasurer of the corporation, and Parisey, its sales manager, had loaded these items into the trunk of Parisey's car at Green Bay before Parisey left for Milwaukee on June 25, 1962. Under Komula's direction a typed receipt for these was drafted in triplicate, consisting of an original and two carbons. No prices or values were then stated on the receipt. Exhibit 1 is one of the two carbon copies of this receipt. It bears the signature of Parisey and written in ink after the listed items are the prices or values thereof. The testimony establishes that these prices or value figures were written on Exhibit 1 by Parisey in the presence of Komula shortly before trial. Both Komula and Parisey testified to the correctness of such figures, which were the actual cost of the listed items

as purchased by Kor-Rect from its suppliers. Komula testified that of his own knowledge he knew the items listed in Exhibit 1 were those loaded into the trunk of Parisey's car.

We hold that when Parisey placed his signature on Exhibit 1 at the time he receipted for the merchandise it became a duplicate original. Therefore, the objection on the ground that it was a carbon copy was properly overruled. Furthermore, even if it had not been signed by Parisey on June 25, 1962, his use of the carbon copy upon which to write down prices or values, coupled with testimony that the items stolen were correctly listed thereon and that the inserted prices or values represented Kor-Rect purchase prices, entitled Exhibit 1 to be received in evidence. Since it was not offered for the purpose of proving the original receipt, the objection that it was a carbon copy lacked validity.

On the issue of the admissibility of carbon copies generally, McCormick, Evidence (Hornbook Series), page 420, sec. 206, states:

> "But the fact that many counterparts today are made by the use of carbons and the notion that writings made by the same stroke are like counterparts has caused a growing number of courts to treat all carbons, when authenticated as true reproductions, as if they were duplicate originals, i.e., as admissible without accounting for the original."

On its face, our holding in *Mack Trucks, Inc.* v. *Sunde* (1963), 19 Wis. (2d) 129, 119 N. W. (2d) 321, would appear to be contrary to McCormick and the cases he cites insofar as a carbon copy of a letter mailed to another is concerned. We find it unnecessary to decide here

whether the rule advocated by McCormick should be adopted by this court, or whether such a rule would encompass a carbon of a letter where the original has been mailed.

By the Court.—Judgment affirmed.

Transcript of Material Parts of Testimony Taken on the Motion to Suppress Evidence on May 10, 1963 Before the Honorable Herbert J. Steffes

GEORGE CRAFT, called on behalf of the defendants, testified as follows:

Direct Examination by Dominic Frinzi:

(125)

Q. Now, you stated that you received this dispatch to go to the Airport from a Corporal of the Michigan State Police, is that correct? A. That is correct.

Q. And what, if anything, did he say over the radio through this dispatch to you when he ordered you to go to the Airport, if you know or remember? A. To the best of my recollection, he stated to go to the Detroit Metropolitan Airport and meet Detective Mc Phail and take up a surveillance on a 1960 maroon Oldsmobile that was parked in Lot 7-A.

He further stated that there had been a $100,000 jewelry theft in the City of Milwaukee that date and that the people or persons involved had their car parked at the Detroit Metropolitan Airport, and he specifically stated this maroon 1960 Oldsmobile with the Ohio license, and I believe that the license number was G 11-598.

He further gave the descriptions—the names of Louis Klein and Thomas Gus Sterger, with their address and

descriptions, as the people wanted in Milwaukee for this theft.

Q. Did he tell you from whom he obtained the information that he gave you on that dispatch? A. No, he did not.

(126)

Q. Did you know at the time you received that information from whom the Corporal had received the information? A. No, sir.

* * * * *

Q. Had you at that time, when you received that information—strike that. Now, from the time that you first were dispatched to the Metropolitan—Detroit Metropolitan Airport, on the 27th day of June, 1962, at or about a little after 6:00—I believe you testified? A. Yes, sir.

(127)

Q. —until about 4:00 o'clock in the afternoon on the 28th day of June, 1962, did you receive any additional information concerning this assignment at the Detroit Metropolitan Airport than the information that the dispatcher gave you when he first dispatched you to the Airport? A. No, sir.

Q. That's the only information you received? A. Correct.

Q. When was the first time that you saw the defendants, Thomas Sterger and Louis Klein, if you know? A. In person, at 3:35 P. M.

Q. On what date? A. June the 28th, 1962.

Q. And where did you see them? A. I saw them in the parking lot, or, going—yes walking in parking lot 7-A, at the Detroit Metropolitan Airport.

Q. Where were you at the time that you saw them? A. We were parked underneath the ramp at the Detroit

Metropolitan Airport facing Aisle 7-A—I think that's about it, sir.

* * * * *

(129)

Q. And you walked over to the vehicle? A. Yes, along with Sgt. Most.

Q. And at that time what did you next do? A. We placed—we identified ourselves as Michigan State Police Officers, and placed Thomas Sterger—who was sitting behind the wheel of the 1960 Oldsmobile, and Louis Klein—who was just outside of the passinger door—under arrest.

Q. And to the best of your knowledge and recollection, what time was this that you placed the defendants under arrest? A. To the best of my knowledge it was at 3:35 P. M.

Q. On what date? A. This was June the 28th, 1962.

Q. And this was during broad daylight, is that right? A. Yes, sir.

Q. In the middle of the afternoon? A. A beautiful sunny day.

Q. At the time that you placed both these defendants under arrest did you tell them what they were under arrest for? A. Not at that time, sir.

Q. At the time that you placed both these defendants under arrest did you have a fugitive from justice warrant in your possession? A. No, sir.

Q. Did you know whether or not there was in existence either in this State of Michigan or in the State of Wisconsin, to your knowledge, a fugitive from justice warrant? A. To my knowledge, no.

Q. To your knowledge, there was no fugitive warrant in existence? A. That's correct.

Q. Either in Michigan or in Wisconsin? A. To the best of my knowledge, no.

Q. To your knowledge at that time, when you placed both these defendants under arrest, did you know whether or not there was a complaint on file with the legal authorities in Wisconsin or in Michigan? A. To my knowledge, no.

Q. To your knowledge, do yon know whether or not there was a warrant on file with the proper legal authorities in Wisconsin or Michigan at the time you placed these defendants under arrest? A. To my knowledge, no.

Q. To your knowledge, do you know whether or not

(131)

there was in existence either in Michigan or in Wisconsin an affidavit sworn to by an individual and presented to a Magistrate? A. You will have to repeat that once again, please.

(Questions read by Reporter)

A. To my knowledge, no, sir.

Q. To your knowledge, do you know whether or not there was in existence at the time you placed these defendants under arrest, a fugitive from justice warrant with the United State's Attorney's office in Michigan or in Wisconsin? A. To my knowledge, no.

Q. To your knowledge, do you know whether or not at the time you placed these defendants under arrest there was any type of a legal process in existence issued by the Governor of the State of Wisconsin to the Governor of the State of Michigan? A. To my knowledge, no.

Q. To your knowledge, do you know whether or not there was any type of legal process in existence at the time you made this arrest, from the Governor of the State of Michigan to the law enforcement agency of the State

(132)

of Michigan, directing or ordering the arrest of these two defendants? A. To my knowledge, no.

Q. To your knowledge do you know whether or not there was in existence in the State of Michigan or the State of Wisconsin an indictment for the apprehension of the two defendants? A. To my knowledge, no.

Q. To your knowledge, at the time that you arrested these two defendants, do you know whether or not there was in existence any information either from the State of Wisconsin or from the State of Michigan, for the apprehension of the two defendants in this case? A. Only the dispatch that I received from our dispatch officer.

Q. By "information" I mean a legal pleading, Officer. A. To my knowledge, no.

Q. At the time that you arrested both of these defendants at the Detroit Metropolitan Airport, did you observe either of the defendants violate any laws of the State of Michigan? A. No, sir.

Q. And by that I mean city ordinances, state laws or federal laws? A. No, sir.

Q. In other words, at the time that you arrested them they were complying with every law in existence in the State of Michigan?

(133)

A. As far as the laws of the State of Michigan, yes.

Mr. O'Connell: So far as you could see?

A. So far as I could see.

* * * * *

(135)

Q. Did you at any time on that day search the defendants? A. Yes, sir.

Q. About what time did you search them, if you recall? A. Approximately 4:00 P.M.

Q. That would be about five, ten minutes later, after the arrest? A. Yes, it was after the arrest.

Q. About five or ten minutes after the arrest, right? A. Or longer, I would say.

Q. But within a short period of time, not exceeding maybe ten minutes? A. I would say that it probably was a little longer than ten minutes.

Q. Would you say it was about fifteen minutes later? A. I would say probably 15 to 25 minutes, approximately.

Q. Now, at the time that you arrested the two defendants at the car did you remove any luggage from the car of the defendants? A. A satchel.

Q. You did remove a satchel? A. Correct.

Q. Anything else? A. There were two sport coats.

Q. Did you take those? A. They were taken to the police booth.

(136)

Q. Did you take them? A. I don't remember if I had them.

Q. Do you know whether your partner did? A. He might have, I don't know.

Q. Did you or your partner take anything else from the automobile at the time that you arrested the two defendants besides the satchel and two sport coats? A. I don't remember taking anything else, sir.

Q. Do you know whether or not your partner took anything else? A. No, I do not.

Q. Now, you then ordered these two defendants to leave from where they were at near the car, is that correct? A. That is correct.

Q. And where did you order them to go? A. They were taken to the police booth, which is located in the main building of the Detroit Metropolitan Airport.

• • • • •

(137)

Q. —and inside the booth, about 15, 20 minutes later, in the police booth is when you went through their pockets and their person more thoroughly, is that correct? A. Yes, sir, we went through more thoroughly.

Q. And it was at that time that you took all of their personal effects from the defendants, is that correct? A. That's correct.

Q. What, if anything, do you recall that you removed from the defendants at this particular time that you conducted this search in the police booth? A. There was a—of course, they had the satchel——

Q. You took that? A. Yes. Also, there was contents in the satchel. There was a light colored sock in the bottom of this satchel. There was a handkerchief in the sock and inside the handkerchief there were sixty-nine General Motors vehicle keys with numbers on them.

I also took a Hamilton wrist watch from the left arm of Thomas Sterger; and there were two airplane tickets, one from Mr. Klein and one from Mr. Sterger.

There was a parking lot stub taken from Mr. Klein.

The Court: The airplane tickets were taken from whom—Sterger?

(138)

A. From Mr. Sterger and Mr. Klein. And there was a parking lot stub that was taken from Mr. Klein, that was issued at the Wayne County Metropolitan Airport. I'm

not positive but I think the date was June the 23rd at 3:02 P.M.—I'm not positive of the date or time.

Mr. Frinzi:

Q. You are not positive of what, sir? A. I am not positive of the date or time on this parking lot stub.

Q. Anything else that you took at that time, sir? A. We had the two sport coats.

Q. And you took these, also? A. We had them there, yes. And at that time Sgt. Whalen and Detective McPhail arrived at the police booth.

Q. Anything else you took besides the items you have now testified to? A. I do not remember at this time. There might have been their wallets there, but I don't know if they were given back to them or not.

Q. Did you take a ring from either one of the defendants? A. Myself—I did not find a ring.

Q. Did you take a ring of any kind from either of the defendants? A. No, I did not.

Q. But you took clothing, isn't that correct? A. Correct.

Q. Was a ring subsequently found in the clothing? A. I understand that it was.

* * * * *

(146)

Cross-Examination by Hugh O'Connell:

Q. Mr. Craft, why did you arrest Mr. Klein and Mr. Sterger? A. On information that I received from our dispatcher.

* * * * *

THOMAS MCPHAIL, called on behalf of the defendants, testified as follows:

Direct Examination by Dominic Frinzi:

(157)

Q. Did you subsequently search those coats?

(158)

A. I did.

Q. And did you find anything as a result of your search? A. Yes, I did.

Q. First of all, where did you search these coats? A. At the State Police booth.

Q. And when was that? A. That was on the morning of the 29th, about 9:30 A.M.

Q. And these coats are the coats that were turned over to you by Sgt. Craft, that had been taken from the defendants at the time they were arrested at the Airport, is that correct? A. That is correct.

Q. And it was in one of these coats that you found a ring, is that correct? A. That is correct.

Q. And what kind of a ring was it? A. It was a man's ring, it was made of white metal, it had a green stone in it. It fit my small finger. I do not know the type of stone it was nor the metal contained in the ring.

Q. And you took that item, that ring, from the coat and inventoried it, right? A. I did.

Q. And that was part of the evidence that was used at the preliminary hearing in this case, is that correct? A. Yes, it was.

(159)

Q. You don't recall what Exhibit it was? A. I do not.

Q. And this was done on the early morning of June

29th, that you took this ring out of the coat? A. That is correct.

Q. The coat was turned over to you the day before? A. That is correct.

Q. And it was taken by Sgt. Craft? A. Right.

Q. From one of the defendants—the coat was taken from one of the defendants. A. Yes.

Q. Now, do you know from which one of the two defendants the coat was taken from? A. I do not know who it was taken from. I know who claimed it.

Q. Pardon? A. I know who claimed the coat.

Q. Who claimed the coat from which the ring was taken? A. Mr. Sterger, he also claimed the ring.

• • • • •

Opinion of the Trial Court Denying Petitioners' Motion to Suppress Evidence

Before Honorable Herbert J. Steffes, Circuit Judge, presiding Milwaukee, Wisconsin May 10, 1963.

(186)

The Court: Well, gentlemen, I will be brief. We must start out with the U. S. Constitution, the Article that has been cited is the one appropriate, Article IV, Sec. 2, clause 2, quoting in full:

"A person charged in any state with treason, a felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

I think this has a very proscribed, specific limited application and refers strictly to the ability of a state to

remove the physical subject wanted in the demanding state from the jurisdiction,

(187)

physically, of another state to its own jurisdiction for prosecution. It has no reference to search and seizure, no reference to the validity of any arrest with respect to whether or not that arrest may be the basis for subsequent search and seizure or the basis of reciprocity, which is circumscribed and under which persons can be legally removed from one state to another for prosecution in the demanding state. And under that the Uniform Extradition Act has been written, there, again, for the limited purpose only of affording full protection and some uniform procedure that may be effected between states for the procedural embellishment of this constitutional clause.

In other words, under the Uniform Extradition Act, unless certain other things follow thereafter, extradition can be defeated.

But I do not think by any implication does this at all interfere with or have any effect upon the validity of an arrest from the standpoint of enabling an officer who properly makes an arrest upon adequate information—reasonable apprehension that a crime in the nature of a felony has been committed—that he may then make such arrest and follow it with a lawful search and subsequent seizure of any articles or contraband that may be involved. I think it's as simple as that. I agree with the State's position.

(188)

The only question here, I think, is whether or not there was such reasonable apprehension. It seems to me that in

addition to what I have said about the Constitutional clause, that it would be completely artificial to limit the applicability of search and seizure merely because the artificial and undisclosed boundaries of the State may intervene. It was never that Constitutional intention. There is another Constitutional provision that applies to unlawful and unreasonable search and seizure, but not this one.

Now, the general rule in effect here and the general rule prevailing is simply—if the officer of person making the arrest has such reasonable apprehension, then a search may be legally consummated and the fruits thereof may be admitted into evidence, otherwise they may suppressed.

Here we have a situation where there was detailed information relayed to these police officers who have testified here—the one who testified extensively, Detective Sgt. Croft—as to these particular persons, naming them and describing them, being involved and wanted in a situation of a $100,000 jewelry theft in Milwaukee and asking that a surveillance be kept upon a well-defined automobile at a well-defined location at the Detroit Metropolitan Airport. Now, the Uniform Extradition Act would protect them from transportation to Wisconsin by the demanding authorities if frul

(189)

compliance were not had with the detailed procedure. They chose later, which is immaterial to our inquiry here, as I ruled this morning,—they later chose to waive extradition. So all those questions concerning extradition itself was absolved—were absolved in that procedure, which is not pertinent, in my opinion.

What is pertinent is what transpired at the moment and at the time of arrest and the information upon which such

arrest was based. If the information was sufficient to form a reasonable apprehension on the part of the arresting person then the subsequent search is validated. It cannot be invalidated by any other actions subsequent thereto.

I see no basis upon which this motion should be granted.

The defendants are the moving parties here, they have the burden of proof, and there is nothing to rebut any testimony given that this information was not the kind of information upon which the Michigan State Police could rely, and there are may cases in point. It won't be necessary to recite any supporting decisions in that respect. . I think we are all familiar with the general rule and I am satisfied this complies with all constitutional and statutory requirements of a valid search and a valid arrest so far as subsequent search and seizure are concerned.

We are not involved with extradition—that was waived, anyway and, as counsel for the defense state, it is not material here.

(190)

I am satisfied this Constitutional clause has exclusive reference to that situation and has no bearing upon the validity of any kind of arrest.

The motion of each defendant to suppress the evidence, on each and all grounds stated, is respectively, as to each defendant, denied.

* * * * *

Affidavit of Service

State of New York
County of New York—ss.:

JAMES EVAN SIFF being duly sworn deposes and says that on the 20th day of January, 1965 he served a copy of the within petition for certiorari and the appendix hereto on the Attorney General of the State of Wisconsin by placing same in a securely wrapped properly postpaid airmail envelope addressed to: Attorney General of the State of Wisconsin Madison, Wisconsin and deponent further states that he sealed the said envelope and placed the same in the mail chute drop for mailing at 401 Broadway, N. Y. 13, N. Y.

JAMES EVAN SIFF

Sworn to before me this
20th day of January, 1965.

S. EDWARD ORENSTEIN
Notary Public
State of New York

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 25 1965
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 853

THOMAS STERGER and LOUIS KLEIN,

Petitioners,

v.

THE STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

WILLIAM A. PLATZ
Assistant Attorney General

HAROLD H. PERSONS
Assistant Attorney General

HUGH R. O'CONNELL
District Attorney,
Milwaukee County, Wisconsin

GERALD P. BOYLE
Assistant District Attorney

Attorneys for Respondent.

PAGE

INDEX

I. OPINION OF THE COURT BELOW 1

II. JURISDICTION 1

III. NATURE OF THE CASE 2-3

IV. STATEMENT OF FACTS 3-4

V. ARGUMENT 4-15

A. THE ARREST OF THE TWO PETITIONERS WAS A LAWFUL ARREST 4-14

B. THIS COURT SHOULD NOT CONSIDER THE CONTENTION THAT THE SEARCH WAS NOT INCIDENTAL TO ARREST 14-15

VI. CONCLUSION 15

AFFIDAVIT OF SERVICE 16

CASES CITED

Beck v. Ohio, (1964) 379 U. S. 89, — Sup. Ct. —, 13 L. Ed. 2d 142 ..... 9, 12, 13

Burton v. New York Cent. & H.R.R. Co., (1911) 147 App. Div. 557, 132 N. Y. Supp. 628, 245 U. S. 315, 38 Sup. Ct. 108, 62 L. Ed. 314 6

Draper v. U. S., (1959) 358 U. S. 307, 79 Sup. Ct. 329, 3 L. Ed. 2d 327 ..... 9, 10, 11, 13

PAGE

Hammit v. Straley, (1953) 338 Mich. 587, 61 N. W. 2d 641 8

Ker v. California, (1963) 374 U. S. 23, 83 Sup. Ct. 1623, 10 L. Ed. 2d 726 ..... 9, 10, 13, 14, 15

Malcomson v. Scott, (1885) 56 Mich. 459, 23 N. W. 166 7

People v. Euctice, (1939) 371 Ill. 159, 20 N. E. 2d 83 7

People v. Wilson, (1962) 229 N. Y. S. 2d 685 9

Richardson v. State, (1953) 97 Okla. Cr. 370, 264 P. 2d 371 9

Scaffido v. State, (1934) 215 Wis. 389, 254 N. W. 651 9

Silver v. State, (1928) 110 Tex. Cr. 512, 8 S. W. 2d 144, 60 A. L. R. 290 9

State v. Klein, (1964) 25 Wis. 2d 394, 130 N. W. 2d 816 ....1, 3

United States v. Di Re, (1948) 332 U. S. 581, 68 Sup. Ct. 222, 92 L. Ed. 210 5

PAGE

CONSTITUTION

United States Constitution

Fourteenth Amendment 1

STATUTES

Sec. 764.15, Mich. Comp. Laws, (1948)
(Mich. Stats. Anno. 28.874 Sec. 15) 6, 7, 14

In The

Supreme Court of the United States

October Term, 1964

No. 853

THOMAS STERGER and LOUIS KLEIN,

Petitioners,

v.

THE STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Wisconsin is reported in *State v. Klein,* (1964) 25 Wis. 2d 394, 130 N. W. 2d 816.

II. JURISDICTION.

Respondent opposes the granting of a writ of certiorari on the ground that the facts of this case do not present any substantial federal question of denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Furthermore, the petitioners are presenting a question for review to this Court which was not presented to the court below. This is violative of proper legal procedure and for that reason it is respectfully submitted that this Court should not assume jurisdiction on that question until such time as the court below has an opportunity to rule on such question.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the Supreme Court of Wisconsin affirming a judgment of the Circuit Court, Criminal Division, Branch No. 11, of Milwaukee county, whereby the petitioners were convicted of the crime of theft. A jury trial was waived and the court found the petitioners guilty of theft and sentenced each of them to twelve years in the Wisconsin state prison.

The petitioners present the following questions for review, to wit:

(1) May two individuals be arrested without a warrant by police officers of one state who have received a teletype message from police officers in another state claiming that the two individuals were suspected of committing a felony in such other state? The petitioners claim that this constitutes an unlawful arrest since there was no formal charge pending against the two individuals in the state where the felony was allegedly committed when the teletype message was sent. The Supreme Court of Wisconsin held that the arrest was lawful.

(2) May a police officer in another state who receives an order from his police radio dispatcher to arrest

certain described individuals who are wanted in another state for committing a felony, arrest such individuals without a warrant? The Supreme Court of Wisconsin held that this was a lawful arrest.

(3) May items which were obtained from a search of the coat of one of two individuals arrested be introduced in evidence if such search was made 18 hours after the initial arrest even though the coat was in the possession of the police department from the time of the arrest? The circuit court permitted such items to be introduced into evidence. The petitioners did not ask the Supreme Court of Wisconsin to review this ruling of the lower court.

IV. STATEMENT OF FACTS.

The facts herein presented are those which appear as the statement of facts reported in the decision of the Supreme Court of Wisconsin, *State v. Klein, supra:*

> On June 27, 1962, the Milwaukee police department sent a teletype message to the Detroit headquarters of the Michigan state police. The message stated that there had been a $100,000 jewelry theft in Milwaukee that day and that the persons involved had parked their 1960 maroon Oldsmobile at the Detroit metropolitan airport bearing an Ohio license plate, the number of which was given. The message also gave the names of the two defendants and their descriptions and stated that defendants were wanted in Milwaukee for this theft. Officers of the Michigan state police found the described Oldsmobile car parked at the airport. They placed the car under surveillance

and the next day arrested the two defendants as they were about to enter it.

Incidental to the arrest defendants were searched and a watch and ring stolen in the theft were found on Sterger. An incriminating bag of keys was found in his luggage. The warrants for the arrest of defendants were not issued in Milwaukee until June 29, 1962, the day following their arrest. Before trial defendants moved that the articles seized as a result of the search made incidental to arrest be suppressed, and such motion was denied.

Defendants waived a jury trial, and trial was had to the court. The seized articles were admitted in evidence over the objection of defendants. The court found defendants guilty. Judgment was entered September 26, 1963, and defendants were sentenced to indeterminate terms of not more than twelve years. Defendants have appealed.

Further facts will be stated as they affect the individual questions presented to this Court.

V. ARGUMENT.

A. THE ARREST OF THE TWO PETITIONERS WAS A LAWFUL ARREST.

The following uncontroverted facts are reiterated here to show that the arrest was lawful.

On June 26, 1962, a theft of an automobile containing a valuable quantity of jewelry was committed in the city and county of Milwaukee, Wisconsin.

On June 27, 1962, the Milwaukee police department sent a teletype message to the Detroit headquarters of the

Michigan state police. The message contained the following information:

(1) There had been a $100,000 jewelry theft in Milwaukee on June 26, 1962;

(2) The persons suspected of the crime had parked their 1960 maroon Oldsmobile at the Detroit airport;

(3) The automobile bore an Ohio license plate;

(4) The license number, names and description of the two suspects were given; and

(5) The two suspects were wanted in Milwaukee for theft.

Detective Sergeant George Craft of the Michigan state police was dispatched via radio to the Detroit Metropolitan Airport. He was given the above information. The 1960 maroon Oldsmobile bearing the described Ohio license plates was located at the airport and put under surveillance. Two individuals answering the description contained in the teletype message proceeded to enter the automobile. Sergeant Craft asked them if their names were Louis Klein and Thomas Sterger, and they informed him that they were. They were arrested by Detective Craft based on the information he had received from his dispatcher.

The legality of the arrests in the case at bar is controlled by Michigan law since Michigan is the state where the arrests took place. *United States v. Di Re,* (1948) 332 U. S. 581, 68 Sup. Ct. 222, 92 L. ed. 210.

Sec. 764.15, Mich. Comp. Laws, (1948) (Mich. Stats. Anno. 28.874 Sec. 15) provides in part:

> Any peace officer may, without a warrant, arrest a person . . .
>
> (e) When he has *received positive information by written, telegraphic, teletypic, telephonic, radio or* other authoritative source that another officer holds a warrant for such arrest; (Emphasis supplied)
>
> (f) When he has received *such positive information broadcast from any recognized police or other governmental radio station,* or teletype as may afford him *reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it.* (Emphasis supplied)

The above statute makes no distinction between the arrest of one in the state of Michigan who has committed a crime in another part of that state, and one who is arrested in the state of Michigan but who committed a crime in another state.

At common law, when a felony was committed in one state, a peace officer of another state could validly arrest without a warrant a person suspected of having committed such felony if reasonable grounds existed for the officer's belief that the arrested person is the one who committed the crime.

> *Burton v. New York Cent & H. R. R. Co.,* (1911) 147 App. Div. 557, 132 N. Y. Supp. 628, affirmed without opinion, (1912) 210 N. Y. 567, 104 N. E. 1127, and latter judgment affirmed (1917), 245 U. S. 315, 38 Sup. Ct. 108, 62 L. Ed. 314;

People v. Euctice, (1939) 371 Ill. 159, 20 N. E. 2d 83;

Malcomson v. Scott, (1885) 56 Mich. 459, 23 N. W. 166.

No Michigan decision has held that sec. 764.15, Mich. Stats. Anno. *supra,* refers only to arrests made in Michigan as a result of a crime committed in Michigan. Therefore, in the absence of statute or a ruling by the courts, the common-law rule prevails. Therefore, sec. 764.15, Mich. Comp. Laws, applies where an arrest is made in Michigan as a result of a crime committed either in Michigan or in any other state.

In the court below, the petitioners relied on *Malcomson v. Scott, supra.* In that case the court held that an arrest made by police officers in Michigan of a fugitive from Pennsylvania was unlawful. However, the Michigan court held the arrest without a warrant unlawful because a letter from the chief of police of Philadelphia, which was basis for the arrest, did not bear his personal signature and failed to establish that a felony had been committed in Philadelphia. Actually the letter from Pennsylvania failed to identify anyone as the sender. The court below cited the *Malcomson* case, *supra,* to the effect that if the chief of police has personally signed the letter and had recited facts sufficient to show that a felony had been committed, the arrest would have been legal. In the case at bar, all such elements were presented to the Michigan state police through the communication from Milwaukee, Wisconsin.

The determination of whether the arrest was lawful should be decided upon the facts in the mind of the arresting officer at the time of the arrest. That arrest was made at the airport by Detective Sergeant Craft. It must be shown that he had probable or reasonable cause to make the arrest.

Probable or reasonable cause has been defined in Michigan in *Hammitt v. Straley*, (1953) 338 Mich. 587, 61 N W. 2d 641, as follows:

> 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth of the accusation'. P. 644

Sgt. Craft's actions were based on information received from Michigan state police headquarters radio. The information included a positive announcement that certain persons, who were described, were wanted in Milwaukee for a $100,000 jewelry theft. Clearly, this constituted a reasonable ground of suspicion—when "supported by [such] circumstances" as the appearance of two of the persons described at an automobile bearing Ohio license plates parked on the lot of a Detroit airport within close air range to Milwaukee—upon which to base a valid and legal arrest.

Reliance by police officers on information received over police radio systems, as a basis for arrest without a warrant, has been ruled justifiable.

Silver v. State, (1928) 110 Tex. Cr. 512, 8 S .W. 2d 144, 60 A. L. R. 290;

Scaffido v. State, (1934) 215 Wis. 389, 254 N. W. 651;

People v. Wilson, (1962) 229 N. Y. S. 2d 685;

Richardson v. State, (1953) 97 Okla. Cr. 370, 264 P. 2d 371.

In the *Scaffido* case, *supra,* in a discussion of probable cause, the court referred (at p. 393) to the *Silver* case, *supra,* and stated that:

> 'In connection with defining probable cause . . . it was held . . . that information received by a police officer over the radio as to commission of a crime and the description of the offenders is sufficient probable cause, when coupled with discovery of persons answering the description, to justify a search without a warrant of the automobile in which they were traveling.'

It is necessary to discuss three leading decisions of this Court that have a direct relationship to the case at bar:

Ker v. California, (1963) 374 U. S. 23, 83 Sup. Ct. 1623, 10 L. ed. 2d 726;

Draper v. U. S., (1959) 358 U. S. 307, 79 Sup. Ct. 329, 3 L. ed. 2d 327;

Beck v. Ohio, (1964) 379 U. S. 89, — Sup. Ct. —, 13 L. ed. 2d 142.

Considering these three cases in light of the factual situation presented in the case at bar, it is respectfully submitted that the inescapable conclusion is that the arrest made in the case at bar was not only lawful but was in obvious recognition of the principles laid down by this Court.

In the *Ker* case, *supra*, this Court said, at pp. 34, 35:

> The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists "where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

After reciting the aforementioned principle, this Court then went on to analyze the facts of which the arresting officers had knowledge at the time of the arrest. This Court then cited *Draper v. United States, supra:*

> [W]e held that information from a reliable informer, corroborated by the agents' observations as to the accuracy of the informer's description of the accused and of his presence at a particular place, was sufficient to establish probable cause for an arrest without warrant. P. 36.

In the *Ker* case, *supra*, the arresting officers were told by a reliable informer that Ker was selling narcotics from his apartment. Ker was seen on the night of the arrest in the company of one Ronnie Murphy who was known to be a large-scale seller of marijuana and who was out on bail in connection with narcotics charges. Ker returned to his apartment where the arrest was subsequently made.

This Court held that probable cause was shown to warrant an arrest.

In the *Draper* case, *supra,* a reliable informer told federal narcotic agent Marsh that Draper was peddling narcotics to several addicts in Denver, Colorado. The informer told Marsh that Draper had gone to Chicago and would be returning on the morning train to Denver on September 8 or 9, 1962, with a supply of heroin. He gave Marsh a detailed description of Draper and of the clothing he was wearing and said that he would be carrying a tan zipper bag and that he habitually walked real fast.

Marsh arrested a man fitting this description at the Denver Union Station on the morning of September 9th. Draper argued that there was no probable cause on which to base the arrest. This Court held that probable cause was shown:

> Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special employee" Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh

had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified. Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true. P. 312, 313.

In the *Beck* case, *supra*, this Court stated at page 91:

> Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

This Court held in the *Beck* case, *supra*, that probable cause was not shown to warrant an arrest. Police officers observed Beck driving his car. They then accosted him, identified themselves, and told him to pull over to the curb. They placed him under arrest, searched his car but found nothing of interest. They then took him to a nearby station, searched his person and found an envelope containing a number of clearing house slips.

This Court in reviewing the record, which it described as "meager," said:

> As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer "had a police picture of him and knew what he looked like," and that the officer knew that the peti-

tioner had a record in connection with clearing house and scheme of chance." P. 93.

Beyond that, the officer testified only that he had "information," that he had "heard reports," that "someone specifically did relate that information," and that he knew what that person was. There is nowhere in the record any indication of what "information" or "reports" the officer had received, or, beyond what has been set out above, from what source the "information" and "reports" had come.

Petitioners in the case at bar submit that the *Beck* case, *supra*, governs. Any attempt to draw an analogy between the factual situation in the *Beck* case and the case at bar is impossible.

Considering the *Ker*, *Draper* and *Beck* cases, *supra*, the conclusion that the arrest in the case at bar was based on probable cause is inescapable. The informer in the case at bar is the Milwaukee police department in the first instance. They inform the Michigan state police that two men who will arrive at the Detroit Metropolitan Airport and proceed to get into a maroon 1960 Oldsmobile bearing Ohio license plates are wanted in Milwaukee, Wisconsin, for a $100,000 jewelry theft. A vivid description of both men is given. Subsequently Detective Sergeant Craft of the Michigan state police is informed of all these facts over his police radio. He proceeds to the airport and finally sees two men, answering the description in every detail, come out of the terminal and go to a maroon 1960 Oldsmobile bearing Ohio license plates. They start to get in the car and at that time Detective Sergeant Craft asks them if they are Louis Klein and Thomas Sterger. They admit that they are. He then arrests them. Therefore, as

to Craft, the "informer" is the Michigan state police. (See Sec. 764.15 Mich. Comp. Laws, *supra*). Clearly probable cause as defined by this Court exists and, therefore, the arrest is lawful.

B. THIS COURT SHOULD NOT CONSIDER THE CONTENTION THAT THE SEARCH WAS NOT INCIDENTAL TO ARREST.

This question was not presented to the Supreme Court of Wisconsin. However, the petitioner argued before the trial court that evidence of jewelry found via the search of the coat of one of the two petitioners the day after the arrest should not be allowed into evidence even though the coat was in possession of the Michigan state police from the time of the arrest. The trial court did not agree. The question was not subsequently presented to the state Supreme Court on appeal.

In *Ker v. California, supra,* where the police without a search warrant searched the automobile of Mrs. Ker on the day subsequent to her arrest, this Court said:

> Ordinarily "[W]e do not reach for constitutional questions not raised by the parties," *Mazer v. Stein,* 347 U. S. 201, 206, N 5 (1954)" nor extend our review beyond those specific federal questions properly raised in the State Court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we, therefore, find no reason to reach it on the record. p. 43, 44.

This Court will not determine the rules by which the state should be governed in the area of search and seizure.

This Court enunciated in *Ker v. California, supra*, that it will only determine whether the rules governing search and seizure in the different states are reasonable. Therefore, unless the court below had an opportunity to apply its law on search and seizure to the factual situation in the case at bar, there is nothing for this Court to review. Since the petitioners failed to present that question to the court below, they may not now ask this court to determine whether there was a reasonable search.

VI. CONCLUSION.

It is respectfully submitted that the arrest without a warrant of the petitioners was based on probable cause and that the petition for a writ of certiorari be denied.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

WILLIAM A. PLATZ
Assistant Attorney General

HAROLD H. PERSONS
Assistant Attorney General

HUGH R. O'CONNELL
District Attorney,
Milwaukee County, Wisconsin

GERALD P. BOYLE
Assistant District Attorney

Attorneys for Respondent.

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

PEARL M. RILEY, being first duly sworn on oath deposes and says:

1. That she is a stenographer employed in the Office of the Attorney General of Wisconsin;

2. That on February 23, 1965 she served a copy of the within Brief of Opposition to Petition for Writ of Certiorari by depositing the same in the United States Post Office at Madison, Dane County, Wisconsin, securely enclosed in an envelope, first class postage duly prepaid, addressed to the following attorney of record for the Petitioner, at his Post Office address as stated below:

Mr. Dominic Frinzi
Attorney at Law
161 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

.....

Subscribed and sworn to before me
this 23rd day of February, A. D. 1965.

(SEAL)

.....
Notary Public, Dane County, Wisconsin.

My Commission expires: .....